STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2005
v	No. 253616 Oakland Circuit Court
BRENT ROBERT MAGYAR, Defendant-Appellant.	LC No. 2003-190853-FC 2003-190854-FC

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant was charged in two cases with first-degree criminal sexual conduct, MCL 750.520b, involving vaginal digital penetration of A.E. and V.A., both girls under eight years old. The cases were consolidated for trial. A jury convicted defendant as charged, and he was sentenced to prison terms of fifteen to fifty years and eight to fifty years for his respective convictions. Defendant appeals as of right. We affirm.

A.E. testified that she used to reside at Stoneridge Apartments in Wixom with her parents. Defendant was a family friend who also resided at Stoneridge and who visited A.E.'s family frequently. One summer day in 1997 when A.E. was four or five years old defendant was at her apartment. A.E. was asleep in her bedroom when defendant came into her room with a book. Defendant started touching A.E. underneath her nightgown and underneath her underwear in her "private area." Defendant put his finger inside her and moved it around. A.E. did not tell anyone about the incident because she was young and did not know what to do.

A.E. did not tell anyone about the touching until March 2003, when her friend K. told her that her father's friend had touched her. A.E. stated to K. that "something like that happened to me." The following day, A.E.'s parents asked her if "anything ever happened to her a long time ago or any other time." A.E. then told her parents about the incident with defendant. A.E. did not remember defendant's name, but remembered that he had a girlfriend named Melissa.

A.E.'s mother testified that she received a telephone call from K.'s mother informing her that she was concerned that A.E. may have been molested. Her concern arose from statements that A.E. made to K. A.E.'s mother told A.E. that "we have reason to believe something happened to you," and asked A.E. if she had anything to tell. A.E. began shaking and crying and seemed very frightened. A.E. eventually told her mother what happened to her. A.E.'s mother

asked A.E. if she "could tell us who it was," and from A.E.'s response her mother knew who it was.

A.E.'s mother called the police and then called Care House, a child advocacy center for abused children. After discussions with a detective, A.E.'s mother contacted the family of V.A., another young girl who lived at Stoneridge and whose family socialized with defendant.

V.A. testified that when she was six or seven years old she was attending a party at A.E.'s apartment when she cut her finger and asked for a Band Aid. Defendant overheard her request and asked V.A. to go to his apartment with him to get a Band Aid. After defendant put the Band Aid on her cut defendant told V.A. that he wanted to do a "secret test" and that if she cooperated she would get a sucker. Defendant instructed V.A. to sit on the floor and close her eyes. Defendant kneeled beside her and told her to pull down her pants and her underwear to her knees, and told her that she could not tell anyone about the secret test. Defendant put his hand on V.A's waist. He then moved his hand down to her vagina and put his finger inside her "private area" and moved it around. V.A. did not tell anyone about the incident. She explained that she did not know the test would "be something bad" and that she did not want to get in trouble for not saying no.

V.A.'s grandmother testified that she told V.A. that there was a "problem" with A.E. at Stoneridge and asked V.A. if something bad happened to her at Stoneridge. V.A. burst into tears. After calming down, V.A. told her grandmother what happened with defendant. V.A. was not able to name defendant, but was able to describe him.

K.K. testified that she was five or six years old when she was sitting on the stairs and writing a letter outside her apartment at Stoneridge. She did not know how to spell "dear," so she knocked on a neighbor's door and asked how to spell the word. Defendant told her to come inside and use his "spelling machine." K.K. sat on defendant's living room floor and defendant handed her the machine. Defendant sat behind her, putting one leg on each side of her body. Defendant started rubbing her legs above the knee with his fingers, and then moved his hands up and underneath her skort and underneath her underwear. He put two fingers inside her "private area" and moved them in a circular motion. Defendant asked her if "it felt good." K.K. pushed back, stood up, and left the apartment. She did not tell anyone about the incident at the time because she was "scared it was her fault because she knocked on his door." K.K. kept the incident a secret until January 2002, when she revealed it to her mother after watching a television movie about a sexual abuse incident.

Sgt. Joe Brian of the Oakland County Sheriff's Department testified that defendant was the prime suspect with regard to a CSC incident involving a young child, A.C. Sgt. Brian interviewed defendant on March 24, 2000. He asked defendant what happened "the day he was playing hide and seek with A.C." Defendant sighed and said, "I did it – I touched her." Defendant stated that he took down A.C.'s pants and fondled her vagina with his bare hand. He stated that he was aroused and that he thought he had an erection.

I

Defendant first argues that the trial court improperly consolidated the two separate cases into one trial in violation of MCR 6.120(B). We review the trial court's decision regarding

joinder for an abuse of discretion. *People v Dureanseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

MCR 6.120 provides:

> (A) Permissive Joinder. An information or indictment may charge a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.
>
> (B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) The same conduct, or
>
> (2) a series of connected acts or acts constituting a single scheme or plan.
>
> (C) Other Joinder or Severance. On the motion of either party, except as to offenses severed under subrule (B), the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. Subject to an objection by either party, the court may sever offenses on its own initiative.

MCR 6.120 codified the Supreme Court's decision in *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977). See *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690, modified 441 Mich 867 (1992).

The trial court in this case permitted joinder of the cases, finding that the offenses "do not involve substantially different proofs which would cause confusion for the jury" and that "the evidence with respect to each complaint is admissible in each of the trials as evidence of a common scheme or plan." The Court also found that consolidation would promote judicial economy because a number of the same witnesses would testify with regard to both counts and that "consolidation will prevent the young victims and the complainant from having to testify repeatedly about sexual assaults." In *People v McCune*, 125 Mich App 100, 103; 336 NW2d 11 (1983), a panel of this Court discussed when offenses are related as part of a single scheme or plan such that joinder of several informations is appropriate. The panel relied on American Bar Association Standards for Criminal Justice (2d ed), Joinder and Severance, as approved by the House of Delegates in 1978, and quoted the commentary to Standard 13-1.2:

> "Common plan offenses are the most troublesome class of related offenses. These offenses involve neither common conduct nor interrelated proof. Instead, the relationship among offenses (*which can be physically and temporally*

> *remote)* is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses. A typical example of common plan offenses is a series of separate offenses that are committed pursuant to a conspiracy among two or more defendants. Common plan offenses may also be committed by a defendant acting alone who commits two or more offenses to achieve a unified goal." [*Id.* at 103 (emphasis added).]

In *McCune*, this Court affirmed the trial court's decision to join cases that involved five separate incidents of conspiracy and robbery or breaking and entering at four separate locations over a time span of nearly five months. *Id.* at 101-102. Similarly, in *People v Miller*, 165 Mich App 32, 44-45; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915 (1990), this Court determined that two offenses involving the same victim were properly joined even though they occurred at different times.

> [T]he victim's testimony revealed that these incidents occurred during warm weather and at the learning center in locations of seclusion. These facts indicate a single plan or scheme on the part of defendant to sexually molest the victim when the opportunity presented itself.
>
> Moreover, the trial did not involve substantially different proofs on these charges to the extent that it would confuse the defendant in his defense, or deprive him of any substantial right. [*Id.* at 45.]

As in *McCune* and *Miller*, the acts alleged in each of the separate cases against defendant constituted "part of a single scheme or plan" on defendant's part to engage in sexual misconduct with young girls to whom he was quite familiar, whom lived in his apartment complex and whose families he socialized with, to whom he could do kind acts to gain their cooperation. Although temporal proximity is not a requirement, *McCune, supra* at 103, the acts in each case occurred within the same time frame when defendant resided at the apartment complex. The offenses were related and, therefore, the issue is whether the trial court abused its discretion in joining the related offenses for a single trial. *McCune, supra* at 102.

Here, the offenses did not involve substantially different proofs such that the jury would be confused by the testimony. See *Miller, supra* at 45. The number of charges and the evidence itself also did not result in any unfair prejudice. MCR 6.120(C). The trial was simple and relatively short. Each victim's individual testimony was sufficient to establish the elements of the crimes involving her. The counts were separately delineated. Additionally, the parties' resources and the convenience of the witnesses were served by joinder in this case. MCR 6.120(C). And the evidence with respect to each victim would have been admissible in each trial, if held separately, as evidence of a common plan or scheme under MRE 404(b).[1] Thus,

[1] We agree with this Court's analysis in a factually similar case:

> We are mindful that in *Daughenbaugh, supra*, at 510, this Court rejected

(continued…)

separate trials would have required repeated testimony from most, if not all, of the prosecution's minor witnesses. Because the testimony of each victim would be admissible in the other trials, the outcome of the cases would not have been different if the cases were tried separately. There was no unfair prejudice to defendant because of the joinder and the trial court did not abuse its discretion by joining the related charges for a single trial.

II

Defendant next contends that the trial court improperly admitted other bad acts evidence under MRE 404(b). We review the trial court's decision to admit evidence under MRE 404(b) for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

MRE 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994), our Supreme Court held that before a trial court may admit evidence of other bad acts, it must determine:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

(…continued)

> the prosecution's argument that joinder was permissible if evidence of the other offenses would be admissible under MRE 404(b) in the separate trials. The ruling is dicta because the panel previously determined that the robberies were not part of a single scheme or plan. *Id.* at 509-510. The robberies occurred over several months and involved a party store, two gas stations, and an automotive store. *Id.* at 508. Because the Court found that the offenses were not related, the trial court was *required* to sever the offense for separate trials. MCR 6.120(B). Whether the evidence of the other offenses could be admitted at the separate trials was irrelevant to a determination of the severance in that case. In the case at hand, the offenses are related and we rely in part on *Duranseau* in concluding that the decision to refuse to sever is not prejudicial if the evidence pertaining to the other charges would have been admissible in each of the trials. [*People v Domas*, unpublished opinion per curiam of the Court of Appeals (Docket No. 235135), slip op at 3 n 3.]

Here, the prosecution filed a Notice of Intent to Introduce Other Acts Evidence that included (a) a first-degree CSC conviction for engaging in vaginal digital penetration with six-year-old K.K. and (b) a guilty plea to second-degree CSC for touching the vagina of eight-year-old A.C. The prosecutor sought to introduce the evidence to show the existence of a scheme, plan or system by which defendant accomplished the sexual assaults and to rebut defendant's claim of fabrication of the charges. The trial court properly found that these are proper purposes under MRE 404(b)(1). *People v Sabin (On Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000).

Under MRE 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the actions more probable or less probable than it would be without the evidence." *People v Mills*, 450 Mich 61, 66; 537 NW2d 909, mod 450 Mich 1212 (1995). Evidence of similar misconduct is logically relevant to show that the charged act occurred where the other acts and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. See *Sabin, supra* at 63. The other acts need only support the inference that the defendant employed the common plan in committing the charged offense. *Hine, supra* at 253. Here, the other acts and the charged offenses shared sufficient common features to infer a plan or scheme. The victims were of a similar age at the time of the abuse and the incidents of touching were similar in nature. Defendant perpetrated the abuse under circumstances that appeared to be acts of kindness, taking advantage of his social relationship with the victims and their families. Defendant's actions "demonstrate circumstantially that the defendant committed the charged offense[s] pursuant to the same design or plan he . . . used in committing the uncharged acts." See *Sabin, supra* at 66. Further, the other acts evidence is relevant to the issue of fabrication of the claims in light of the lack of medical testimony or third-party witness testimony. See *People v Starr*, 457 Mich 490, 501-502; 577 NW2d 673 (1998).

Defendant argues that the probative value of the challenged evidence was substantially outweighed by the danger of unfair prejudice. Here, the other acts evidence is substantially more probative than prejudicial because it shows defendant's plan, scheme or system of sexually assaulting young girls and helps refute his contention that the victims fabricated the offenses. The trial court did not abuse its discretion in the determination that the danger of undue prejudice did not substantially outweigh the probative value of the evidence, particularly given the court's limiting instructions to minimize the danger of unfair prejudice. *People v Pesquera*, 244 Mich App 305, 308, 320; 625 NW2d 407 (2001).

III

Finally, defendant asserts that he was denied a fair trial by the trial court's failure to sua sponte declare a mistrial when some prospective jurors stated during voir dire that they would have difficulty presuming defendant innocent upon learning defendant admitted to previously touching a child. Defendant claims that the prospective jurors' answers tainted the entire panel and resulted in an impartial jury that deprived him of his right to a fair trial. We disagree.

It is clear from the record that defense counsel was aware that defendant's admission to a prior bad act was going to be introduced at trial and that defense counsel brought up the prior bad act and questioned the prospective jurors for the precise reason of determining any grounds for challenging their impartiality. Some of the jurors who indicated they could not be impartial were excused for cause, some were excused by defense counsel's peremptory challenges, and the

court excused one. Defense counsel subsequently indicated his satisfaction with the jury. The record does not support a finding that the entire jury was tainted by the prospective jurors' answers to the questions posed by defense counsel, and defendant has failed to establish plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 507 NW2d 130 (1999).

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski